IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 1198 of 2001
(Old No. 938 of 1997)

1. Nazakat (Since deceased)
   S/o Visharat Hussain.
2. Mohammad Rafi @ Rafiya
   S/o Mohammad Navi …Appellants

Versus

State of Uttar Pradesh …Respondent.

Shri Asif Ali, learned Amicus Curiae for the appellant.
Shri Rajeev Mohan Birkhani, learned A.G.A. for the State.

Hon'ble Prafulla C. Pant, J.

This appeal, preferred under Section 374 (2) of Code of Criminal Procedure, 1973 (for brevity herein after referred as Cr.P.C.) is directed against the judgment and order dated 25.04.1997, passed by learned Special Judge/Additional Session Judge, Nainital, in Sessions Trial No. 170 of 1996 and Sessions Trial No. 171 of 1996, whereby each of the appellants-Nazakat and Mohammad Rafi has been convicted under Section 307/34 of Indian Penal Code, 1860 (for brevity herein after referred as I.P.C.) and under Section 25 of Arms Act, 1959. Each appellant is sentenced to undergo rigorous imprisonment for a period of three years under Section 307/34 I.P.C. and rigorous imprisonment for a period of six months under Section 25 of Arms Act, 1959.

2. Heard learned counsel for the parties.

3. Prosecution story in brief is that on 31.05.1995, before the day of incident there had been a theft in the

House of P.W. 2 Ahmad Nabi, S/o Abdul Wahi for which a report was lodged against appellants Nazakat and Mohammad Rafi. Since then, enmity between the parties developed. On 05.06.1995 (that too before the day of incident in question), Ahmad Hussain, brother of aforesaid complainant was attacked and injured by accused/appellants. Thereafter, on 13.06.1995, at about 8:30 P.M., infront of gate of Muncipality office, accused/appellants, made attempts to commit murder of Hanif, S/o Ahmad Hussain (brother of complainant). It is the fourth incident dated 10.10.1995 which is in question in this case. According to the prosecution, on 10.10.1995, at about 7:00 P.M., infront of gate of Muncipality office, when complainant's son Ahmad Nabi (P.W. 2) and son-in-law Ali Hussain, were buying some vegetables, accused/appellants Nazakat and Mohd. Rafi, came there and fired shots from their country made pistols. Each one of the accused/appellants is said to have fired once. However, no one got injured. It is alleged that there was chaos in the market after this incident, and shopkeepers shut down their shutters. Report of the incident, appears to have been lodged by the complainant P.W. 1 Abdul Wahid with the police station Kashipur, on that very day against both the accused/appellants and a crime No. 1026 of 1995 is registered under Section 307 I.P.C. against them. When the investigation started on the same day, accused/appellants are d to have been arrested along with the country made pistol from the possession of Nazakat and another crime No. 1027 of 1995 is registered against him under Section 25 of Arms Act. The recovery memo (Ext. A-2) was prepared by the police regarding the

Recovery of fire arm. After interrogating the witnesses, site plan (Ext. A-3) was prepared and after obtaining sanction (Ext A-4) for prosecution the accused under Arms Act, charge sheets- Ext. A-5, Ext. A-6 and Ext. A-7, were filed against the accused/appellants for their trial in respect of offence punishable under Section 307 I.P.C. and also for trial of Nazakat under Section 25 of Arms Act, 1959.

4. The Magistrate, on receipt of charge sheet, appears to have provided necessary copies to the accused persons, as required under Section 207 Cr.P.C., committed the case to the Court of Sessions, for trial. Though offence punishable under Section 25 of Arms Act, was triable by Magistrate but since it was connected with offence punishable under Section 307 I.P.C., the said case was also committed to the Court of Sessions. Learned Sessions Judge, it appears that after hearing the parties, framed charges of offence punishable under Section 307/34 I.P.C. against both the accused/appellants Nazakat and Mohammad Rafi. Accused/appellant Nazakat was further charged under Section 25 of Arms Act, 1959. Appellants pleaded no guilty and claimed to be tried. On This, prosecution got examined P.W. 1 Abdul Wahid (informant), P.W. 2 Ahmad Nabi (eye witness) and P.W. 3 Bhuvnesh Datt Sharma (Investigating Officer). The evidence was put to the accused persons under Section 313 Cr.P.C. in reply to which they alleged that they have been falsely implicated due to enmity. After hearing the parties, the trial court found each of the accused/appellants, guilty of offence punishable under

Section 307/34 I.P.C. Accused/appellant Nazakat was further found guilty of offence punishable under Section 25 Arms Act. And after hearing on sentence, each of the appellants was sentenced to rigorous imprisonment for a period of three years under Section 307/34 I.P.C. Accused/appellant Nazakat was also sentenced to rigorous imprisonment for a further period of six months under Section 25 of Arms Act. Aggrieved by said judgment and order dated 25.04.1997, this appeal was preferred by convicts before Allahabad High Court in the year 1997, from where it has been received by transfer to this Court under Section 35 of U.P. Reorganisation Act, 2000, for its disposal. (During the pendency of appeal, appellant No. 1 Nazakat is reported to have died, as he was killed in an encounter with the police. As such the appeal of appellant Nazakat stood abated).

5. It is a no injury case. The only eye witnesses, examined in this case are P.W. 1 Abdul Wahid, P.W. 2 Ahmad Nabi, who are father and son. There is admitted enmity between the parties. The incident is said to have taken place in the market. But no public witness is examined. In the circumstances, it cannot be said to be safe to rely on the testimony of P.W. 1 Abdul Wahid and P.W. 2 Ahmad Nabi, as a trustworthy one. Non examination of the public witnesses with the factum that there is admitted enmity and there is no injury on the person of either the complainant or the son or son-in-law of the complainant, creates reasonable doubt, as to the truthfulness of the prosecution story. Nay, not only this, as to the recovery of fire arm from accused/appellant

Nazakat, there is no eye witness account except the statement of P.W. 3 Bhuvnesh Datt Sharma (Investigating Officer), which further creates reasonable doubt as to the prosecution story, alleged by the prosecution.

6. For the reasons as discussed above, this Court is of the view that it cannot be said that the prosecution has been successful in proving the charge against the appellant –Mohammad Rafi, and he is entitled to the benefit of doubt. Therefore, the appeal deserves to be allowed. Appeal of appellant Mohammad Rafi is allowed. His conviction and Sentence, recorded by the trial court is set aside. He is acquitted of the charge of offence punishable under Section 307 read with Section 34 I.P.C. He is on bail. He need not to surrender. (As far as, appeal of appellant Nazakat is concerned it is abated due to his death during the pendency of this appeal).

Dt. 02.11.2006 **(Prafulla C. Pant, J.)**
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